INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1211

JAMES M. CURLEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1235

DONALD WAKEFIELD SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (App. 54–79)* have not yet been reported.

*The designation App. refers to the appendix to the petition for certiorari on behalf of petitioner Curley. The designation R. refers to the typewritten transcript of record on file in the office of the Clerk of this Court.

JURISDICTION

The judgment of the Court of Appeals (App. 80–81) was entered January 13, 1947. A petition for rehearing on behalf of petitioner Curley was denied February 4, 1947 (App. 81), and a petition for rehearing on behalf of petitioner Smith was denied February 20, 1947 (Smith Pet. 61). On February 27, 1947, the Chief Justice extended Curley's time to file a petition for a writ of certiorari to April 5, 1947, and his petition was filed on that date. On March 22, 1947, the Chief Justice extended Smith's time to file a petition for a writ of certiorari to April 11, 1947, and his petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioners' convictions.

2. Whether petitioner Curley's testimony in supplementary proceedings that he had received money from the Engineers' Group was properly admitted in evidence against him to show such fact.

3. Whether it was proper to admit, against petitioner Smith, evidence of acts of co-conspirators in furtherance of the conspiracy performed before Smith joined the enterprise.

4. Whether it was prejudicial error to exclude a group of 20 exhibits offered en masse on behalf of Smith after the evidence had been closed.

STATEMENT

Petitioners were convicted on a number of counts of an indictment returned against them and others in the District Court of the United States for the District of Columbia, charging use of the mails in execution of a scheme to defraud and conspiracy so to use the mails (App. 1–52; R. 3755–3757). Petitioner Curley was sentenced to imprisonment for a term of six to eighteen months and to pay a fine of $1,000, and petitioner Smith was sentenced to imprisonment for a term of four months to a year and a day and to pay a fine of $1,000 (R. 3902). On appeal, the judgments were affirmed (App. 80–81), one judge dissenting as to Curley on the ground that the evidence was insufficient to support his conviction (App. 71–79).

The evidence for the Government may be summarized as follows:

A. *The scheme to defraud.*—It is not disputed that the evidence amply established a scheme to defraud and the use of the mails in execution thereof in the operations of Engineers' Group, Inc., under the active management of the defendant Fuller. The Group began to function about June 26, 1941 (Gov. Ex. 5, R. 1431), although it was not actually incorporated until October 31,

1941 (Gov. Ex. 103, R. 1383). It had completely disintegrated by February 1942 (R. 1398–1399, 1441).

In general, the evidence showed that the Group was represented as being in a position to secure government contracts for construction work and later for conversion to war work. Various corporations were induced to pay an initial deposit as part of a fee for securing contracts under agreements providing that the fee would be returned if a contract was not obtained, and numerous misrepresentations were made to induce the payment of fees. No contracts were obtained and, except in a few instances, the money received as deposits was never returned.

Typical of the manner in which deposits were obtained from construction companies was the experience of John Ruff, a builder in Baltimore, Maryland (R. 173). In November 1941 Fuller told Ruff that the Engineers' Group was composed of outstanding men with the prestige required to obtain contracts for important housing projects, mentioning Curley as one of such prominent members (R. 385). Fuller also told Ruff that the Beverly Terrace project at Alexandria had been approved by the F. H. A., and that a lending institution was ready to loan money for the project (R. 384–385, 386–387). On November 18, Ruff entered into a contract with Fuller, paying him $5,500 as an initial fee (R. 389–390, Gov. Ex. 9

and 10, R. 392). The contract contained representations that the Beverly Terrace Housing project had been approved by the F. H. A. district office and that commitments had been made by the Central Life Branch of Washington, D. C. There were also provisions to the effect that the deposit was to be held as security and was to be returned if no suitable contract for the construction work was tendered to Ruff (Gov. Ex. 9, R. 392). No contract was ever offered to Ruff (R. 408). On January 14, 1942, Ruff demanded the return of his $5,500 (Gov. Ex. 21, R. 407), but the money was never returned (R. 408). The representations as to commitments by the F. H. A. and the lending institution were false (R. 2379–2381).

A number of other witnesses testified to substantially similar transactions. La Rocca (R. 180–260) entered into a number of agreements with the Group on false representations as to commitments by lending institutions (cf. Gov. Ex. 23, R. 197–198; Gov. Ex. 25, R. 211; Gov. Ex. 29, R. 224; Gov. Ex. 36, R. 240, with R. 2381, 2733, 2738–2739, 2501–2502, 2543, 2379–2381). J. W. Bishop Company paid $3,100 under an agreement containing false representations regarding commitments on a project known as Alexandria Village (cf. Gov. Ex. 43, R. 476, with R. 2292, 2298), and $2,500 on a bank building falsely alleged to have been approved by the District Commissioner (cf. Gov. Ex. 47, R. 497, with R. 2381, 2497,

2794, 2798). Powers paid $2,500 on the same bank building project (Gov. Ex. 50, R. 639). Rocheford deposited $3,580 on false representations that commitments had been made on a project known as the Colebrooke Housing Development (cf. Gov. Ex. 60, R. 730, with R. 2307). Schweers and Smith also paid $3,580 on the Colebrooke project (R. 1137–1138).

An example of the operations of the Group in connection with conversion for war work was the experience of Harold Forse, president of the Forse Corporation (R. 1217). He met Fuller and petitioner Smith at the Blackstone Hotel in Chicago on December 6, 1941 (R. 1220). Fuller told Forse that the Engineers' Group was composed of men who knew how to secure contracts, men experienced in ordnance work, and engineers able to assist in conversion (R. 1221). He mentioned Curley as the head of the company (R. 1222). Fuller implied that a fuel injector developed by Eisemann Magneto had been placed in the hands of the Group for development (R. 1224). He stated that the Engineers' Group had total assets of between $200,000 and $300,000 (R. 1229, 1230–1231), and had $10,000 on deposit at the Pilgrim Trust Co. in Boston (R. 1249). Later that month, at a meeting with Fuller and Smith in Washington, Forse was given a prospectus of the Group (R. 1240–1241; Gov. Ex. 94, R. 1245). The prospectus represented that the Group had "personally planned and supervised over $100,000,000 of

construction in the last twenty years"; that through their banking facilities, they could "obtain accommodations up to $1,000,000 working capital"; that they were consultants for a number of construction and industrial companies, engineers, and architects; that "construction awards total about 800 houses * * * consisting of about $4,000,000." When Forse told Fuller that the Pilgrim Trust Co. had reported that there was no money on deposit to the credit of the Group, Fuller purported to call an official of the bank on the phone and berate him (R. 1249). On December 19, Forse, on behalf of his company, entered into a contract with Engineers' Group, paying $3,750 in cash and giving a note for $3,750 as a retainer (R. 1252; Gov. Exs. 95–97, R. 1255). Subsequent to the execution of the contract, two engineers visited the plant of Forse's company, remaining there about three hours (R. 1257–1258, see R. 1821). Forse discussed with Fuller a number of different types of possible contracts (R. 1250–1251, 1259–1260, 1265), but no contract was ever tendered to the company, although efforts were made to get it a subcontract from Willys-Overland (R. 1265, 1307–1308). The money paid as a retainer was never returned (R. 1271).

In substantially similar manner, fees were paid to the Engineers' Group in the expectation of receiving war contracts by the Glenwood Range Co., of Taunton, Massachusetts ($5,000) (Gov.

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Exs. 79, 80, R. 1024, 1032; see R. 1018–1036); the Norcor Corporation, of Green Bay, Wisconsin ($7,500) (Gov. Exs. 69, 70, R. 836; see R. 821–843); and Advertising Metal Display Co., of Chicago, Illinois ($7,500) (Gov. Exs. 158, 159, R. 2669; see R. 2656–2675). Other witnesses testified that they had been solicited on the same basis but had declined to enter into an agreement with the Group (R. 1444–1450, 1511–1522, 1944–1961, 1986–1998, 2015–2022, 2118–2121). It was represented to one or more of these firms that Engineers' Group employed a staff of trained engineers (R. 1030, 1517, 1949, 2663), whereas, in fact, the group merely employed one Major Hawkins for a short period and had him make a survey of the Forse and Glenwood plants, failing, however, to pay him all that was due him (R. 1798–1821). The Group apparently also hired another firm which sent out two engineers to make brief surveys of the Norcor and Advertising Metal plants (R. 830, 2674). One of the firms solicited by the Group obtained a Dun and Bradstreet report on the company (R. 838). That report was prepared on the basis of information supplied by Fuller (R. 928–930, 933; Gov. Ex. 71, R. 933; Gov. Ex. 72, R. 945), showing a surplus of approximately $250,000, which was nonexistent (see R. 1415–1417, Gov. Exs. 168–172, R. 2847). The prospectus of the Group, which, as set forth above, was false in every material respect, was shown to several of the companies

(R. 1958–1959, Gov. Ex. 127, R. 2140; Gov. Ex. 81A, R. 1035, 1037).

Although the corporation was represented in its financial report as having a capital stock of $20,000 (Gov. Ex. 81B, R. 1037), no capital was ever put into the enterprise (R. 1417). The only source of income was the deposits obtained from persons for whom contracts were to be obtained (Gov. Ex. 108, R. 1418; Gov. Ex. 171, R. 2847). In all, the Group collected approximately $67,000 from various corporations and refunded only $9,600 (Gov. Ex. 108, R. 1418; Gov. Ex. 172, R. 2847). No contract was ever obtained for any of the clients. By February 1942, the Group had been abandoned by its officers, Fuller had disappeared, and the one remaining employee levied on the furniture for his unpaid salary (R. 1398–1399, 1441, 1643). The group owed money for rent (R. 147–149), owed money to the Sherry-Netherlands Hotel in New York (Gov. Ex. 116, R. 1705), and had numerous checks outstanding against it, although its bank balance was only $8.00 (Gov. Ex. 6, R. 1434; Gov. Ex. 7, R. 1438).

B. *Participation of Curley.*—Curley was the president and a director of the Group from its inception until he resigned (Gov. Ex. 153, R. 2485).[1] He represented himself as being con-

[1] The exact date of Curley's resignation does not appear in the record. Gov. Ex. 153, R. 2485, shows Curley as president on Dec. 15, 1941, and Gov. Ex. 154, R. 2485, records the resignation of the defendant Underwood as president in Feb. 1942.

nected with the organization in the period prior to actual incorporation (R. 465, 630, 666, 2040–2042, 1134, 1168–1169), and his connection with the Group was constantly mentioned to persons who were solicited to do business through it (R. 184, 385, 635, 1027, 1134, 1993, 1222, 2021, 2121; see also R. 1823–1824).

In July 1941, Curley arranged for the opening of a bank account for a member of the Group at the Pilgrim Trust Company in Boston, stating that he, Curley, was connected with the Group (R. 2040–2042). He also endeavored to have the bank make a loan to Engineers' Group as such to be held as a frozen deposit, i. e., with the understanding that no money could be drawn thereon, but that the bank would certify to persons making inquiries that the Group had such a sum on deposit (R. 2043).

George E. Rocheford, vice president of a contracting firm of Worcester, Massachusetts (R. 719–720), was introduced to Curley and Fuller in July 1941 by Desmond, a co-defendant (R. 722) as to whom the case was severed because of his illness (R. 4–8). At the meeting, Curley stated that the Rocheford Company was a well known firm of contractors (R. 722). Fuller said that the Group handled several jobs in various parts of the country involving large sums of money, and that he would investigate the capacity of the Rocheford firm (R. 723). On August 12, 1941,

Rocheford and Desmond went to Washington and discussed with Fuller the proposed Colebrooke housing development (R. 725–726). The next day, when a tentative agreement was discussed and executed, and a fee of $3,580 paid, Curley was in the room (R. 727, 730–733).

William P. Haskell, representing the contracting firm of Schweers and Smith (R. 1129–1131), went to the office of the Engineers' Group in Washington in July 1941 (R. 1132–1133). Fuller introduced him to Curley (R. 1133, 1167). They talked for some time about a proposed project at Fort Reynolds (R. 1167–1168). Curley then left, saying, "I am leaving this matter in Mr. Fuller's hands" (R. 1134, 1168–1169). Schweers and Smith entered into an agreement with the Group, paying $3,580 in the expectation that they would be awarded a contract for the Colebrooke project (R. 1137–1138; Gov. Exs. 82, 83, R. 1141–1142). In October 1941, when Haskell met Curley by chance in Boston, Curley asked him how he was getting along, and Haskell said he would be glad to see some action. Curley replied, "I will take it up with Mr. Fuller and see if we can't get it started." (R. 1144–1145.) Early in January 1942, Haskell met Curley and Fuller at a dinner in Washington, and Curley said, "I think you will find Jim [Fuller] can work things out" (R. 1145). Subsequently, the amount of their deposit was returned to Schweers and Smith (R. 1146).

In August 1941, Frank M. Gifford, a contractor of Worcester, Massachusetts (R. 461–462), was introduced to Curley in Boston by Desmond (R. 464). Curley inquired about the equipment of the Gifford company and asked whether they were capable of handling other construction work (R. 465). Curley then made a telephone call, and upon his return he told Gifford that Fuller, "their man in Washington," was about to leave for New York, that he had a prospect that was all ready to materialize, and that it would be desirable for Gifford to meet Fuller in New York that very evening (R. 465–466). Gifford did meet Fuller in New York (R. 468). On August 12, Gifford entered into an agreement with the Engineers Group, whereby his company paid $3,100 in the expectation that it would be awarded a contract for the construction of houses at Alexandria Village (R. 475–476; Gov. Ex. 43, R. 476).

John W. Powers, another Massachusetts contractor (R. 627), also met Curley through Desmond (R. 629). Curley told him that the Group "had several jobs and several contracts and they needed contractors to do them"; that if Powers were interested, he would introduce him to Fuller (R. 630, 666). He said that Fuller was a "live wire" and had a lot of construction work (R. 631, 666). Curley arranged to meet Powers in Washington (R. 631). Powers did meet Curley and Desmond in Washington, and Desmond took Pow-

ers to the offices of the Group (R. 632). Powers entered into an agreement with the Group, paying $2,500 in the expectation that he would be awarded a contract for the Hamilton Bank Building (R. 633, 636–637; Gov. Ex. 50, R. 638–639). Curley was present in the office during one of Powers' meetings with Fuller but did not enter into the discussion (R. 654). Powers lost interest in the project, and tried to stop payment on the check, but it cleared by mistake (R. 645–646). He tried to collect the money from the Group (R. 646, 648–649), and in the course of these negotiations telephoned Curley several times (R. 650, 652, 685–686). Curley said that he would talk to Fuller and try to have the money sent (R. 650, 652, 685). The money was never repaid (R. 646).

In the summer of 1941, when Fuller was trying to get one Edward Turgeon to pay $25,000 for a contract for the construction of an aluminum factory (R. 2119, 2121), Curley was in the room when Fuller discussed the details of the project and the proposed fee (R. 2122–2123).

In December 1941, Harold Forse, whose dealings with the Group have been set forth at pp. 6–7, *supra*, met Curley in the anteroom of the Group's office while waiting for Fuller during the period when they were carrying on the negotiations which eventuated in the signing of a contract. Curley told Forse that "he was waiting on a telephone call to a young man" who had,

after a great deal of trouble, developed a method of making high octane gasoline, and that he had helped the young man secure a trial order that would enable him to build a small plant (R. 1238–1239).

In December 1941, while Hawkins was employed by the Group to make a survey of the Glenwood plant (see p. 8, *supra*), he met Smith, Fuller, and Desmond in Boston (R. 1812). On December 13, they drove to the Glenwood plant (R. 1814). Curley rode in the car with Hawkins, but did not go to the plant (R. 1814). He joined the group at the local inn and later entertained them at his home (R. 1815–1816). Curley and Fuller seemed to be on very cordial terms (R. 1816, 1905). The next day, Fuller told Hawkins that Curley had suggested that they survey another plant near Boston, and Hawkins was driven there by Curley's chauffeur (R. 1817). Curley, Fuller, Hawkins, and Smith returned to Washington together (R. 1818).

In December 1941, Curley was examined in supplementary proceedings in Boston. He was questioned about a transaction on August 8, 1941, in which he gave the Hibernia Savings Bank of Boston, $3,500 in cash (R. 3177–3178, 3180).[2]

[2] The money was paid to take up a check which had not cleared, made by Irving Newcomb, Inc. to the order of James Fuller and endorsed by Fuller. That check, in turn, had replaced a check endorsed by both Fuller and Curley (R. 3152–3153).

Curley said that he "seemed to act as a messenger or agent in the transaction"; that he received the $3,500 from an official of the Engineers' Group in Washington, whom he subsequently identified as Fuller (R. 3180, 3182). He described the Group as "an advisory body of engineers that transacts business," and stated that he had business relations with the Group (R. 3180). He said that the $3,500 was paid to the bank to take up a check of the Engineers' Group which he had previously received in Washington and had forwarded to his wife to cash (R. 3182). When asked the nature of his business association with the Group, Curley replied, "I would say I worked with them in the development of business" (R. 3182). He said the $3,500 check was originally given to meet "certain obligations" to him (R. 3182). He also said he was a stockholder in the corporation (R. 3182) and that he used part of the $3,500 to pay his local bills (R. 3183).

C. *Participation of Smith.*—Smith acted as treasurer of the Engineers' Group and as a director from December 15, 1941, to February 15, 1942 (Gov. Exs. 137A, 137B, 137C, R. 2059; Gov. Ex. 117, R. 1710). One exhibit shows him as treasurer on December 3, 1941 (Gov. Ex. 137A, R. 2059).

On November 29, 1941, Hamilton, of the Forse Corporation, was told by Smith that he "had or expected to become associated with an engineer-

ing group interested in the placement of contracts for defense work." In answer to a question by Hamilton, Smith stated that a fee for a government contract was permissible provided it covered engineering services and provided such a fee was stipulated and set forth in the contract. (R. 1368–1370.) On December 6, 1941, Smith was with Fuller at the Blackstone Hotel in Chicago when Fuller entered into the negotiations with Forse described at p. 6, *supra* (R. 1220–1222). Smith was also present at the meeting with Forse in Washington, at which Forse was given the Group's fraudulent prospectus (R. 1240–1241). As Forse was about to leave Washington, he recalled that he had inadvertently neglected to sign the check given to the Group, and he telephoned Fuller, stating that he would send another check or try to have the one he gave honored. Smith took the check to the railroad station for Forse to sign (R. 1255–1256).

William Hays Forster, a Pennsylvania manufacturer, met Smith on January 19, 1942, through a N. L. R. B. representative who was conducting an election at the plant (R. 1442–1443). Smith told Forster that he thought his company was in a position to manufacture airplane parts, and that "they felt quite sure that with their connections they could get us this war work" (R. 1445). The next day, Smith, accompanied by several other people, went to the plant and discussed the terms of

a contract, asking 6 per cent. of the gross and a down payment of $7,000 (R. 1447–1448). Smith said that they had obtained contracts for another company (R. 1449). Forster declined to enter into an agreement (R. 1450).

Wallace W. DeLaney of the Faultless Rubber Co. had learned of Smith through a representative of the N. L. R. B. in June 1941, and had corresponded with Smith from June to August 1941 (R. 1508–1511). In January 1942, DeLaney met Smith at the offices of the Engineers' Group in Washington (R. 1511–1512). DeLaney took notes of their conversation (Gov. Ex. 110, R. 1514–1515). Smith said that the Group wanted a fee of 6 per cent. with an advance payment of $7,500 for engineering services, the money to be returned if no business was received (R. 1516–1517). Smith stated that if new equipment were needed the Group would obtain materials and supply A–1 priorities (R. 1518), and would train employees for the new type of work (R. 1519).

Donald MacGregor, an electrical and radio manufacturer, met Smith at the Blackstone Hotel in Chicago on December 6, 1941 (R. 1945–1946, 1949). They had a discussion about war contracts, and Smith was very sanguine about his ability to help MacGregor, stating that "they had done so with others who had substantially the same facilities" (R. 1946–1947). Fuller came into the

room while Smith and MacGregor were talking, and suggested that MacGregor enter into an agreement on a retainer of $15,000, the money to be returned if no business was obtained (R. 1951, 1953). Fuller said he and his group had been able to get government contracts (R. 1954). MacGregor asked for a prospectus of the Group and one was delivered to him the next day (R. 1958).

In December 1941, Fuller went to the APCO-Mossburg Co. seeking to have them manufacture .37 mm. shot (R. 2449). The president of the corporation offered to sell him the company for $500,000, and Fuller seemed interested (R. 2451). Fuller and Smith had a conference with the president of the corporation in New York, and talked over the possibility of the sale, giving the president to understand that the money was on deposit in a bank in New York (R. 2454–2455).

Ralph T. Scantlebury, an officer of the Toycraft Rubber Co., was referred to Smith by one Blackmore, an employee in charge of labor relations, who had formerly been associated with Smith (R. 1986–1987). On December 29, 1941, Scantlebury and Blackmore called on Smith at the offices of the Engineers' Group in Washington, and there met Fuller (R. 1987–1988). Fuller stated that the Group was taking over the APCO-Mossburg Co. to make shells for the Russian Government, and that it was necessary to move the machinery out of the Mossburg plant (R.

1989). He sought to have Scantlebury sign a contract with the Group, stating that the Mossburg machinery would be moved to the Toycraft Co. at a nominal cost to be used by Toycraft in filling war contracts to be obtained by the Group. Fuller asked Scantlebury for a down payment of about $5,000 and 6 percent commission on orders. (R. 1990–1991.) In talking with Smith, Scantlebury took exception to the request for a down payment, stating that his company's financial status could easily be ascertained (R. 1995–1996). He testified that he said to Smith, "What do we know about you?" and that Smith replied, "Well, they don't make any pretense of carrying any balances because they cut their dividends quite frequently and in sizeable quantities" (R. 1996).

As treasurer, Smith was in a position to know the precarious financial position of the Engineers' Group in December 1941 and January 1942. The bookkeeper testified that he told Smith "any time he wanted to know, practically daily, how much money the books showed was in the bank" (R. 1408; see also R. 1661–1662). On December 17, when Smith took over the office of treasurer, the balance was $115.55, and the first checks written by Smith were for $502.30 to Hawkins and one to Smith himself for $200 (R. 1658). In December 1941, Smith tried to get the Pilgrim Trust Company of Boston to lend the Group from $15,000 to $25,000 as a frozen deposit without the

right to draw thereon (R. 2064).[3] A number of checks returned for insufficient funds were signed by Smith (R. 1651; Gov. Ex. 7, R. 1438). Smith wrote checks representing some of the few deposits that were returned to clients, and thus was in a position to know that contracts had not been obtained as promised (R. 500, 505; Gov. Ex. 48, R. 505; Gov. Ex. 87, R. 1152; Gov. Ex. 105, R. 1413; R. 1653).

ARGUMENT

1. Faced with the knowledge that this Court will not ordinarily review the sufficiency of evidence to support a conviction, petitioners have endeavored to transform an attack on the sufficiency of the evidence into a legal question of the proper functions of the trial court on a motion for a directed verdict and of the appellate court on review (No. 1211, Pet. 10–51; No. 1235, Pet. 14, 15, 22). The difficulty with their approach, however, is that the questions which they argue so vigorously have already been definitively answered by this Court. In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, one of the defendants sought reversal of his conviction on the ground that there was no substantial evidence that he had knowledge of or participated in the unlawful

[3] The president of the bank could not identify Smith from the stand, but testified that Smith was sent in through Curley and left his signature card on December 17, 1941 (R. 2064–2065). The testimony of Hawkins shows that Smith was in Boston at that time (R. 1812–1818).

conspiracy. He had raised the question by a motion of a directed verdict at the close of the case, and in this Court relied upon the doctrine of *Isbell* v. *United States*, 227 Fed. 788 (C. C. A. 8), upon which petitioners here also rely (see Supplemental Brief on behalf of McElroy, Nos. 346–347, Oct. T. 1939). This Court said (310 U. S. at 254):

> * * * His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. *Abrams* v. *United States*, 250 U. S. 616, 619; *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U. S. 434, 444; *Lancaster* v. *Collins*, 115 U. S. 222, 225.

See also *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251–252; *Stilson* v. *United States*, 250 U. S. 583, 588–589. Obviously, if substantial evidence is the proper test by which to judge the action of the trial judge in permitting a case to go to the jury, it is the proper test for the trial judge to apply on a motion for a directed verdict.

Almost every circuit court of appeals in the country has held that in situations where a finding of guilt depends on the inferences to be drawn from the circumstances proved, the determination whether such circumstances are sufficient to establish guilt beyond a reasonable doubt is for the jury and not for the court. *Morton* v. *United States,* 147 F. 2d 28, 30 (App. D. C.), certiorari denied, 324 U. S. 875; *Yoffe* v. *United States,* 153 F. 2d 570, 573 (C. C. A. 1); *United States* v. *Valenti,* 134 F. 2d 362, 364 (C. C. A. 2), certiorari denied, 319 U. S. 761; *United States* v. *Picarelli,* 148 F. 2d 997, 998 (C. C. A. 2); *United States* v. *Brandenburg,* 155 F. 2d 110, 112 (C. C. A. 3); *United States* v. *Reginelli,* 133 F. 2d 595, 599 (C. C. A. 3), certiorari denied, 318 U. S. 783; *Roberts* v. *United States,* 151 F. 2d 664, 665 (C. C. A. 5); *Whaley* v. *United States,* 141 F. 2d 1010 (C. C. A. 5), certiorari denied, 323 U. S. 742; *Blalack* v. *United States,* 154 F. 2d 591, 594 (C. C. A. 6), certiorari denied October 14, 1946, No. 232, this Term; *United States* v. *Levy,* 138 F. 2d 429, 430-431 (C. C. A. 7), certiorari denied, 321 U. S. 770; *Braatelien* v. *United States,* 147 F. 2d 888, 893 (C. C. A. 8); *Hansbrough* v. *United States,* 156 F. 2d 327, 329 (C. C. A. 8); *Gorin* v. *United States,* 111 F. 2d 712, 721 (C. C. A. 9), affirmed, 312 U. S. 19; *Scott* v. *United States,* 145 F. 2d 405, 408 (C. C. A. 10), certiorari denied, 323 U. S. 801; *Rogers* v. *United States,*

129 F. 2d 843, 844 (C. C. A. 10). It is to be noted that in this group of cases are included decisions, subsequent to those cited by petitioners, in the very circuits which petitioners contend apply a standard different than that held applicable in the decision below. If, therefore, there ever was a conflict between the decision below and the decisions in other circuits, that conflict has long since been resolved.

Actually, however, there is no conflict. When examined in relation to their facts, it is clear that the decisions relied upon by petitioners hold no more than that a verdict of acquittal must be directed if the evidence, taken in the light most favorable to the Government and with all possible inferences drawn in favor of the Government, is still as consistent with innocence as with guilt.[4] Those decisions do not hold that, where the inferences that reasonably can be drawn from the Government's evidence may establish guilt beyond a reasonable doubt, a verdict of acquittal must be directed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation of defendant's conduct. If that were the rule, no case in which any inference must be drawn by the jury could stand. See *United States* v. *Valenti*, 134

[4] That this was the rule actually applied by the trial court is shown by its action in directing a verdict of acquittal as to two of petitioners' codefendants (R. 3141).

F. 2d 362, certiorari denied, 319 U. S. 761, *supra*.

Here the evidence establishes that petitioners lent their names and the prestige acquired through public office to an enterprise which they knew had no financial stability. They continued to be active in the enterprise when they knew that the promises made were not being kept. They made statements to prospective customers which were false and which they either knew or should have known were false.[5] Given its kindest interpretation, such evidence establishes that reckless disregard of truth or falsity which in law has always been considered the equivalent of willful intent to defraud. *Pierce* v. *United States*, 252 U. S. 239, 251; *Cooper* v. *Schlesinger*, 111 U. S. 148, 155; *Baker* v. *United States*, 115 F. 2d 533, 541 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Stunz* v. *United States*, 27 F. 2d 575, 579 (C. C. A. 8); cf. *Screws* v. *United States*, 325 U. S. 91, 103–104, 130. Given its most obvious interpretation, it clearly justifies a finding of knowing and informed participation in a criminal enterprise. In this connection, it should be noted that the jury must have found actual participation, and not merely reckless conduct, for the trial judge, in an

[5] The brief on behalf of petitioner Smith neglects to set forth statements definitely attributed to him by various government witnesses (see Statement, *supra*, pp. 16–19). The fact that these witnesses declined to enter into contracts with the Engineers' Group does not lessen the probative force of their testimony.

instruction probably more favorable to the defendants than the law required, charged (R. 3740):

> As to count 16, as well as the mailing counts, guilt does not attach to one who merely knows of a criminal conspiracy or enterprise, or of acts in furtherance thereof, even though done in his presence. A passive knowledge or attitude is not enough. There must be not only knowledge, but also actual and conscious union with the criminal group. Therefore, official connection with Engineers' Group, Incorporated, suspicion or knowledge or [sic] an unlawful plan or purpose among others in the group, if such there were, carelessness or indifference to the duties of an office, inattention to details of its affairs, or overconfidence in other officers or agents of the organization will not of themselves suffice to make one a party to a criminal conspiracy in connection with the conduct of its business. Besides knowledge of such a criminal scheme, there must be a positive intention to give adherence and support to the same.

It is significant that there was no dissent in the court below as to the sufficiency of the evidence to support the verdict against Smith; that as to Curley, the majority of the court below stated that not only could a jury reasonably be convinced of his guilt beyond a reasonable doubt, but that they themselves were so convinced (App. 68); and that in summarizing the evidence as to

Curley, the dissenting judge neglected to consider Curley's own statements in the supplementary proceedings that he worked with the Group in the development of business, that he received $3,500 from the Group, and that he considered himself a stockholder in the Group, thus obviously expecting to share in any profits that might be made.

2. None of the other contentions urged by petitioners presents any question of merit.

(a) Petitioner Curley argues (Pet. 51–54) that his testimony in the supplementary proceedings (see Statement, *supra,* pp. 14–15) should have been admitted only to show business association with Fuller and not as evidence that he received money from the Group, despite the fact that he himself stated in those proceedings that the money was paid to him by the Group to meet "certain obligations." This extraordinary suggestion is predicated on the fact that the government's evidence does not disclose receipt of money from any victim by August 8, 1941, the date on which Curley received the $3,500. However, the testimony of the bookkeeper subsequently employed by the Group shows that the records were in a chaotic condition (R. 1417), and there might well have been funds not reflected in the records available to him. Furthermore, negotiations for contracts with persons referred by Curley were in progress in August 1941 (see Statement, *supra,* pp. 11–13), and it is not improbable that money

could have been borrowed in anticipation of expected fees. In any event, the Government was clearly entitled to take Curley's own statements as it found them. And since such statements were directly related to the issues at the trial, they were properly admitted in evidence for whatever they tended to prove.

(b) The contention of petitioner Smith that the court in its instructions did not follow the rule laid down by this Court in *Kotteakos* v. *United States,* 328 U. S. 750 (Pet. 14, 15, 22), is apparently based on the assumption that two separate conspiracies were proved—one to obtain fees for construction contracts and the other to obtain fees for conversion to war work. It is clear, however, that there was in fact only one conspiracy to defraud by representing the Engineers' Group as an organization in a position to obtain government contracts. It is true that Smith entered the conspiracy after it had been in existence for some time, and that the trial judge, properly holding that he could not be held responsible for the substantive offenses committed before his participation, directed an acquittal as to Smith on the counts which charged mailings prior to his entry into the conspiracy (R. 3143). But it is settled that one who joins a conspiracy after its inception is deemed to have adopted all that has gone before, and that evidence of prior acts by co-conspirators in furtherance of the conspiracy may be

offered against the latecomer as well as against his co-conspirators. *United States* v. *Manton*, 107 F. 2d 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States*, 91 F. 2d 691, 696 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764; *McDonald* v. *United States*, 89 F. 2d 128, 133 (C. C. A. 8); *Laska* v. *United States*, 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker* v. *United States*, 21 F. 2d 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621; *Van Riper* v. *United States*, 13 F. 2d 961, 967 (C. C. A. 2), certiorari denied *sub nom. Ackerson* v. *United States*, 273 U. S. 702. It should also be noted that, in his requests to charge (R. 3842–3843), Smith did not ask for any instruction limiting the effect of any particular evidence.

(c) Finally, Smith contends (Pet. 14, 22) that the trial court committed reversible error in excluding documentary evidence which he offered after he had called witnesses in his own behalf, and after the evidence had been finally closed. The Court of Appeals stated that, since most of the documents had been identified on cross-examination of government witnesses and had been available to the government, their exclusion might have been considered reversible error if the substantial rights of Smith had been affected, but that, after examining each of the documents, the court had reached the conclusion that none of

them had any real bearing on the issue of Smith's good faith and hence that the exclusion did not operate to his prejudice (App. 69–71).

The circumstances under which the exhibits were offered and excluded appear at pp. 3328–3334 of the record. We think the Court of Appeals was unduly critical of the trial judge's action. The judge indicated that, if counsel had overlooked a few exhibits, he would give him an opportunity to offer them, but that he did not believe that, after the case had been closed, it was proper to offer a large mass of exhibits, the materiality and relevancy of which might well be questioned (R. 3328–3331). As we shall show below, the materiality and relevancy of many of the exhibits was in fact very questionable; indeed, a number of them were clearly inadmissible. It is significant that when Smith's counsel did seek to take advantage of the court's offer to admit a few exhibits, he offered in evidence an affidavit by Smith himself (R. 3332–3333). Under the circumstances, we do not believe that the trial judge abused his discretion in refusing to admit a mass of exhibits at that point.

In any event, the Court of Appeals was clearly correct in holding that the exclusion of the exhibits did not affect Smith's substantial rights. Many of the exhibits would have been inadmissible under any circumstances, and the others have no real bearing on the issue of Smith's good faith.

Exhibit 1 is a letter written by Smith on April 8, 1942, to the cashier of the Metropolitan Bank of Washington stating that he had learned that a check dated April 3, 1942, bearing his signature as treasurer of the Engineers' Group, Inc., had been given to the manager of Wilson's Mens Wear; that the check was a forgery; and that he had severed all connection with the Group on February 16, 1942. Since the letter and the transaction to which it related occurred after the Group had completely disintegrated, it is difficult to understand how the letter could have been deemed relevant or admissible.

Exhibit 2 was renumbered Government's Exhibit 163 and was admitted in evidence (R. 2703).

Exhibit 3 is an announcement of the resignation of Smith as treasurer and is a duplicate of Government's Exhibit 117, which was admitted in evidence at R. 1710.

Exhibit 4 is a letter to Fuller from one Dickman acknowledging receipt of the announcement; this letter was never identified (R. 714–715).

Exhibit 5 is a letter to Fuller from the Norcor Corporation, dated February 24, 1942, i. e., after Smith's resignation, which did not refer to Smith at all. Moreover, the major portions of the letter were quoted verbatim in cross-examination of the witness who identified it (R. 989–991).

Exhibits 6, 8, 9, and 10* are communications between the Forse Company and Fuller, which showed that Forse believed that Fuller was getting contracts for the company, and that Forse anticipating buying machinery to carry out the contract. None of these letters refer to Smith. The facts which the letters tended to prove were fully developed by the Government on direct (R. 1250–1251, 1257, 1259–1260, 1265–1268, 1269–1271, 1277) and by defense counsel on cross-examination of Forse (R. 1287–1296, 1304–1308). Furthermore, the substance of these exhibits was set forth in the testimony of the witness on cross-examination (R. 1327–1350).

Exhibit 11 is a letter written by Smith to John Hamilton, of the Forse Corporation, on June 11, 1943, showing that Smith was then trying to get business for the corporation. It obviously has no relevancy to Smith's conduct in the period from December 1941 to February 1942. Moreover, Forse testified that his company did have dealings with Smith as late as 1943, and that they had no complaint about his services (R. 1359).

Exhibits 12 and 14 are letters from the Hays Manufacturing Company to the Glenwood Range Company and the Forse Company, stating that Smith had referred to those companies as ones which had taken advantage of the services of Engineers' Group, Inc. to equip themselves to under-

* Exhibit 7 went into evidence as Gov. Ex. 98 (R. 1259).

take defense contracts "and that such contracts had been undertaken" and asking about the companies' experiences with the Group. Exhibit 13 is a reply to the Hays Company from the Glenwood Range Company, stating that Glenwood had no success at all with the Group, and that Fuller was a high pressure salesman. Obviously, this correspondence was not helpful to Smith. In fact, it shows that, contrary to the assertions in his brief, he did attempt to negotiate contracts in the name of the Group. Hays testified on direct examination that Smith told him that the Group had obtained contracts for either the Glenwood Range or Forse Company (R. 1449), and he testified further on cross-examination that Smith had given both those companies as references (R. 1457).

Exhibit 15 is a statement of deposits and payments by the Group from December 17, 1941, to February 13, 1942, prepared by the bookkeeper employed by the Group. The exhibit contains only the figures themselves, and those figures were taken from Gov. Ex. 108, which was introduced at R. 1418 (see R. 1487). The fact, which Smith stresses in his petition (Pet. 10–11), that he did not obtain a complete statement of this nature until February 1942, was brought out, not by the exhibit, but by the testimony of the bookkeeper on the stand (R. 1402, 1417–1418, 1481, 1482, 1485–1488). In this connection, however, Smith fails

to mention the other testimony that he was told the bank balance "practically daily" (R. 1408).

Exhibit 16 is a letter from DeLaney, of the Faultless Rubber Company, to Smith, dated July 17, 1941, about a proposed government contract. Since that date was about six months before Smith joined the Engineers' Group, it could prove only that DeLaney had prior dealings with Smith about government contracts, a fact to which DeLaney had already testified (R. 1509–1510, 1527–1529).

Exhibit 17 is merely a check dated January 20, 1942, for $1,500 made to the order of Williams and Englehardt. The letter referring to the enclosed check was introduced as Gov. Ex. 144 (R. 2168, 2172).

Exhibit 18 is a statement by Fuller dated February 16, 1942, containing a list of checks preceded by the following paragraph:

> This is to certify that I, James Fuller, as Executive Vice President of Engineers Group Inc. authorized and directed you, as treasurer of Engineers Group Inc. to issue the following checks at the time each of them was issued.

Conceivably, this statement might have been admissible against Fuller as a declaration against interest. But we do not know on what possible basis Smith would have had any right to introduce this hearsay declaration without any testimony by Fuller. The statement was obviously

not a record kept in the ordinary course of business nor an act in furtherance of the conspiracy.

Exhibit 19 consists of a group of letters from Anderson to Smith in the period from April 23 to August 2, 1942. They showed that Anderson had some dealings with Smith in that period, that he believed Smith "and a couple of the other boys do not deserve a deal of this sort," and that he warned Smith that witnesses were being called to testify before a grand jury. This was the only exhibit which the court below thought had any bearing on the issue of Smith's good faith. We submit, however, that these letters were clearly inadmissible. Anderson was not one of the witnesses who implicated Smith. In fact, he testified that he first met Smith in April or May of 1942, i. e., after the Group had disintegrated, and that he never received any communication from Smith about his contract with the Group (R. 2676). His letters merely expressed his opinion long after the event on the very issue which was before the jury for determination. Far from limiting Smith's right of cross-examination, the court erred in his favor by allowing the substance of one of these letters in evidence on cross-examination of Anderson by Smith's counsel (R. 2681–2682).

Exhibit 20 is an affidavit by Smith given to Anderson when the latter was trying to recover his deposit in April or May of 1942, long after

Smith had severed connection with the Group. It was clearly inadmissible as a self-serving declaration. The facts that Smith did give the affidavit and that he did try to help Anderson were established by the testimony of Anderson on cross-examination (R. 2684–2685).

Under all the circumstances, we submit that the trial court did not err in excluding this mass of exhibits offered on behalf of Smith.

CONCLUSION

The ruling below in these cases is in accord with principles already enunciated by this Court. There is consequently no conflict of decision, and there is raised no other question meriting further review. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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